INTELLIGENCE IDENTITIES PROTECTION ACT OF 1981—S. 391

HEARING

BEFORE THE

SUBCOMMITTEE ON SECURITY AND TERRORISM

OF THE

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

NINETY-SEVENTH CONGRESS

FIRST SESSION

ON

S. 391

A BILL TO AMEND THE NATIONAL SECURITY ACT OF 1947 TO PROHIBIT THE UNAUTHORIZED DISCLOSURE OF INFORMATION IDENTIFYING CERTAIN UNITED STATES INTELLIGENCE OFFICERS, AGENTS, INFORMANTS, AND SOURCES AND TO DIRECT THE PRESIDENT TO ESTABLISH PROCEDURES TO PROTECT THE SECRECY OF THESE INTELLIGENCE RELATIONSHIPS

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FRIDAY, MAY 8, 1981

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
SUBCOMMITTEE ON SECURITY AND TERRORISM,
Washington, D.C.

The subcommittee met, pursuant to notice, at 9:38 a.m., in room 2228 of the Everett McKinley Dirksen Senate Office Building, Senator Jeremiah Denton (chairman of the subcommittee) presiding.

Also present: Senators Thurmond, East, Biden, and Leahy.

Senator DENTON. The hearing will come to order.

The subject of the Subcommittee on Security and Terrorism hearing this morning is the Intelligence Identities Protection Act of 1981, Senate bill 391.

Before proceeding further, I would like to recognize the presence of the distinguished chairman of the overall committee, a man who has my great admiration and to whom I look daily for leadership, my distinguished colleague from South Carolina, Senator Strom Thurmond.

OPENING STATEMENT OF SENATOR STROM THURMOND

Senator THURMOND. Thank you very much, Mr. Chairman, for your kind words.

Mr. Chairman, I would like to commend you for the expeditious manner in which you have set up this hearing.

As a cosponsor of this necessary piece of legislation, I believe it is imperative that we act quickly but effectively to see that this matter is given a full and fair hearing. It is also necessary that parties with special concerns be heard and their views weighed by the subcommittee.

We must, however, keep in mind the special needs of the brave and unsung emloyees of the intelligence agencies of this country. We must remember, too, that uninformed policymakers cannot properly serve the people, and without the information these employees provide, policy will suffer.

This bill aims at protecting the identities of those individuals whose anonymity serves the interest of the country. Moveover, this legislation would insure an appropriate balance between individual rights and the absolute necessity for secrecy in intelligence collection vital to the Nation's security.

Mr. Chairman, I shall not be able to stay throughout the whole hearing, as I have a bill coming up in the Senate in a few minutes; but I want to take this opportunity to welcome the head of the CIA

here this morning, Mr. Casey, who is an experienced, well-versed man on intelligence matters.

I would also like to join in welcoming to this committee the distinguished Senator from Rhode Island, my good friend Senator Chafee.

Thank you, Mr. Chairman.

OPENING STATEMENT OF CHAIRMAN JEREMIAH DENTON

Senator DENTON. Thank you very much, Mr. Chairman. I know how busy you are as President pro tem of the Senate, and with the many bills you are managing in the Senate.

We would like to welcome my distinguished colleague, Senator Leahy, who has a great deal of background in this subject and has, in his experience with the Select Committee and other committees on which we happen to serve together, shown me how much he is going to help us in the future as he has in the past. After I welcome the witnesses, I will ask you for anything you care to say, sir.

Our witnesses I will introduce one at a time, and then ask them to take their positions. First, we already have in the witness chair the Honorable John H. Chafee, Senator from Rhode Island, who actually sponsored this bill and who has urged us not to waste any time in getting to it; and I assure you, John, that we have not. We have had a Department of Justice review of the bill in which certain things were questioned, and we have gotten to it as quickly as we could.

We have William J. Casey, the Director of the Central Intelligence Agency; Richard K. Willard, Counsel for Intelligence Policy, Department of Justice; Morton H. Halperin, director, Center for National Security Studies, American Civil Liberties Union; Jerry J. Berman, legislative counsel, American Civil Liberties Union; and John M. Maury, president, Association of Former Intelligence Officers.

You will be seeing them one at a time as they come up. Welcome to you all, gentlemen.

I will make my opening statement, and then proceed.

In this subcommittee's previous hearing on Friday, April 24, 1981, which was devoted to the origins, direction, and support of terrorism, all of the witnesses testified regarding past and present Soviet and surrogate support for international terrorism. It is relevant to see the expulsion of the Lybian Embassy personnel which took place only yesterday.

In reviewing the media coverage which ensued after our last hearing, I was disappointed, to say the least, that some of those journalists covering the hearing seemed to miss the central thrust of the testimony. They tended to focus on an apparent lack of evidence of Soviet masterminding of international terrorism, a point of view to which no one connected with this hearing has ever subscribed.

That I should have been described as "surprised" or "disappointed" by a lack of evidence showing Soviet masterminding of this pernicious activity is to misrepresent my views, which I have repeatedly articulated. And it seems curious that that alleged disap-

pointment for many reporters was the No. 1 news fact, which was reported.

Since my personal views have been so variously reported in the press, I feel compelled to state again for the record that it is the intention of the subcommittee to hold hearings to examine judiciously the extent to which terrorism poses a threat to the security of the United States. We have not prejudged this matter. We are and we will remain sensitive to the need to search out the evidence and to deal with it responsibly.

There were many elements of the media that reported the hearings objectively, but superficial reports of this type are sufficiently widespread to cause me concern that the American people are not being well informed.

I am convinced by my own experiences that there is an irrefutable link between terrorism and national security. This has been demonstrated time and again in those countries whose survival is crucial to our own security. Turkey, the Federal Republic of Germany, South Korea, and South Africa are current examples. Similarly, the protection of covert sources has a direct bearing on our own national security through our ability to monitor terrorist and other activities worldwide.

Therefore, with this in mind, the Subcommittee on Security and Terrorism today undertakes a most important task. An examination of provisions of S. 391 which is a bill to amend the National Security Act of 1947 to prohibit the unauthorized disclosure of information identifying certain U.S. intelligence officers, agents, informants, and sources; and to direct the President to establish procedures to protect the secrecy of these intelligence relationships.

Events transpiring in the world continue to demonstrate that it is absolutely essential that our country maintain a strong and effective intelligence apparatus in order to insure that our national security is maintained unimpaired. Human collection sources of intelligence are of vital importance to the success of this overall effort. It would follow, therefore, that unauthorized disclosures of information identifying individuals engaged in, or assisting in our country's foreign intelligence activities, are undermining the intelligence community's human source collection capabilities and exposing to needless dangers the lives of our intelligence officers in the field.

The disclosure of the identity of a covert agent is an immoral act which cannot be tolerated. It has no relation whatsoever to speaking out against Government programs which are wasteful. It in no way bears a relationship to the whistleblower who seeks to enhance his Government's ability to perform more efficiently by bringing to the attention of those in responsible positions deficiencies such as fraud or waste in the agency in which the whistleblower serves.

No; the reprehensible activities, the commission of which this bill is designed to criminalize, have repeatedly exposed honorable public servants to personal peril and vastly reduced their effectiveness in pursuing their endeavors. The insensitivity and moral degeneracy on the part of those who seek to undermine the effectiveness of our intelligence capability is so inimical to our American democratic system that it seems, to me at least, that much of what

we are prepared to do today should be totally unnecessary; and it is indeed unfortunate that this is not the case.

While in a free society we must welcome public debate concerning the role of the intelligence community as well as that of other components of our Government, the irresponsible and indiscriminate disclosure of names and cover identities of covert agents serves no salutory purpose whatsoever.

As elected public officials, we have a duty consistent with our oaths of office to uphold the Constitution and to demonstrate our support for the men and women of the U.S. intelligence service who perform duties on behalf of their country, often at great personal risk and sacrifice, a service vital to our national defense.

Extensive hearings before the House and Senate Intelligence Committees have documented these pernicious effects. The underlying basic issue is our ability to continue to recruit and retain human sources of intelligence whose information may be crucial to the Nation's survival in an increasingly dangerous world.

No existing law clearly and specifically makes the unauthorized disclosure of clandestine intelligence agents' identities a criminal offense. Therefore, as matters now stand the impunity with which unauthorized disclosures of intelligence identities can be made implies a governmental position of neutrality in the matter. It suggests that the U.S. intelligence officers are fair game for those members of their own society who take issue with the existence of a CIA or find other perverse motives for making these unauthorized disclosures.

In the area of identities' protection, we must steer a course carefully calculated between enormous interests. On the one side we have the protection of a constitutional right of free speech; and on the other, the vital need to protect the effectiveness of U.S. intelligence gathering around the world.

Today we will hear from six witnesses with varying viewpoints who can enlighten us in this important area.

Senator Leahy, before the questioning begins, would you care to make an opening statement?

OPENING STATEMENT OF SENATOR PATRICK J. LEAHY

Senator LEAHY. Thank you, Mr. Chairman.

I compliment the Chair on having hearings on what I think is an extremely important subject. I am delighted to see our colleague from New England—southern New England—Senator Chafee, who has done yeoman's service in this field in the Intelligence Committee and on the floor of the Senate.

Mr. Chairman, few Americans are ever going to be in a position to assess the full extent of the extraordinary contribution of our intelligence officers to the security of our Nation. Perhaps because of the nature of their work—well, in fact, it is because of the nature of their work that we will never be in a position to fully assess it. There can be no doubt, however, that the naming of names has resulted in the diminished effectiveness of our intelligence efforts, and the loss of life.

The legislation before this committee effectively deals with the violations of oath and good judgment by those who have had authorized access to classified information about covert agents. There

is no first amendment purpose to be served in assuring the rights of agents to violate their professional duties, and I give these provisions my strongest support.

Mr. Chairman, section 601(c) of the bill tries to deal with information that has gotten beyond the perimeter of the intelligence community, beyond the hands of those whose silence we may require as a matter of contract. We do have a legitimate interest in protecting the security and effectiveness of the intelligence agents even where compromising information is in the hands of agency outsiders. But the standards cannot be standards growing out of the notions of contract and duty, but rather, standards that examine the purpose of and intent of disclosure and define "prohibited activity" with care.

The bill that does not clearly separate legitimate discussion of the intelligence function in this country from the purposeful and malicious naming of names could mean the effective end of all meaningful discourse about intelligence. The first amendment has always been a very down-to-earth concept for me. It means writing or speaking without fear. And nothing would dampen honest expression faster than confusion about the legal limits of that expression.

If we adopt legislation that makes it perilous to write about the CIA, or if the bill is so vague that the only safe course of action is to write nothing, not only is the public the loser but I think our intelligence agencies are the losers, also. What is true of other government agencies is true of the intelligence agencies—they operate poorly in a permanent vacuum.

There has been concern about the constitutionality of section 601(c) because it limits the use of information in the public domain. While I share that concern, I recognize that there will be instances where information in the public domain but not widely circulated can become dangerous to our security if circulated with notoriety.

So let us try to identify those instances and define them with such precision that misunderstanding of the law's intent would be difficult. Let us also recognize that this bill will not by itself cure intelligence leaks. If the identity of agents has come into the public domain, somewhere the system has broken down. Our first job is not to tamper with the first amendment, but to fix the system and make sure that the leaks do not occur in the first place.

Resting on a strong system for insuring adequate cover for our intelligence agents, a bill like S. 391, carefully drafted, can immeasurably improve both the quality and the security of our intelligence services. Unless carefully done, however, the bill might fall short of the enforceable protection we need, and yet weaken legitimate expression in an area where the need for continuing dialogue has been clearly demonstrated.

I have no truck with those who feel that they must, under the guise of whistleblowing, run out and hold a press conference and endanger the lives of agents to get their point across. We have provided legitimate forums for whistleblowers—not only in legislation that I have drafted that has been passed by previous Congresses, but in the Senate Select Committee on Intelligence, there is an easy, immediately available forum for people within any of the intelligence agencies with legitimate gripes to come to us, and they

will be heard by a bipartisan forum on relatively short notice in as complete detail as they want.

That is a proper and appropriate forum for those people who have been entrusted with the greatest and most delicate secrets of our Nation. That is the proper and appropriate method to take. I think that within our intelligence community steps should be taken to insure that that is the way it is done.

In saying that, however, we should also be aware as a nation that when information has come into the public domain through whatever means, that we also as a nation have a duty to protect the first amendment rights involved when such information has gotten out into the public domain.

Let us continue to make everybody within the intelligence agencies aware of the fact that we do have legitimate areas for legitimate gripes to be aired without taking steps that may well endanger our whole system and our whole country.

Thank you, Mr. Chairman.

Senator DENTON. Thank you, Senator Leahy.

Senator LEAHY. I should also comment, Mr. Chairman, that I am on another committee, Senator Helms' committee, that has been having a markup of the farm bill for 2 weeks now, and at some point this morning I will have to leave for that.

Senator DENTON. We are all familiar with that problem, and we appreciate your presence here this morning for the time you are able to devote to it, Senator Leahy.

Before we begin with our distinguished witness, I wish to place a copy of S. 391 in the record.

[Copy of S. 391 follows:]

97TH CONGRESS
1ST SESSION

S. 391

To amend the National Security Act of 1947 to prohibit the unauthorized disclosure of information identifying certain United States intelligence officers, agents, informants, and sources and to direct the President to establish procedures to protect the secrecy of these intelligence relationships.

IN THE SENATE OF THE UNITED STATES

FEBRUARY 3 (legislative day, JANUARY 5), 1981

Mr. CHAFEE (for himself, Mr. GOLDWATER, Mr. BENTSEN, Mr. DANFORTH, Mr. DOMENICI, Mr. GARN, Mr. GLENN, Mr. HAYAKAWA, Mr. JACKSON, Mr. LAXALT, Mr. LUGAR, Mr. NUNN, Mr. PRESSLER, Mr. ROTH, Mr. SCHMITT, Mr. SIMPSON, Mr. WALLOP, Mr. HATCH, Mr. HUDDLESTON, and Mr. THURMOND) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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A BILL

To amend the National Security Act of 1947 to prohibit the unauthorized disclosure of information identifying certain United States intelligence officers, agents, informants, and sources and to direct the President to establish procedures to protect the secrecy of these intelligence relationships.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

That this Act may be cited as the "Intelligence Identities Protection Act of 1981".

SEC. 2. (a) The National Security Act of 1947 is amended by adding at the end thereof the following new title:

"TITLE VI—PROTECTION OF CERTAIN NATIONAL SECURITY INFORMATION

"PROTECTION OF IDENTITIES OF CERTAIN UNITED STATES UNDERCOVER INTELLIGENCE OFFICERS, AGENTS, INFORMANTS, AND SOURCES

"SEC. 601. (a) Whoever, having or having had authorized access to classified information that identifies a covert agent, intentionally discloses any information identifying such covert agent to any individual not authorized to receive classified information, knowing that the information disclosed so identifies such covert agent and that the United States is taking affirmative measures to conceal such covert agent's intelligence relationship to the United States, shall be fined not more than $50,000 or imprisoned not more than ten years, or both.

"(b) Whoever, as a result of having authorized access to classified information, learns the identity of a covert agent and intentionally discloses any information identifying such covert agent to any individual not authorized to receive classified information, knowing that the information disclosed so identifies such covert agent and that the United States is taking affirmative measures to conceal such covert agent's intelligence relationship to the United States, shall be fined

not more than $25,000 or imprisoned not more than five years, or both.

"(c) Whoever, in the course of a pattern of activities intended to identify and expose covert agents and with reason to believe that such activities would impair or impede the foreign intelligence activities of the United States, discloses any information that identifies an individual as a covert agent to any individual not authorized to receive classified information, knowing that the information disclosed so identifies such individual and that the United States is taking affirmative measures to conceal such individual's classified intelligence relationship to the United States, shall be fined not more than $15,000 or imprisoned not more than three years, or both.

"DEFENSES AND EXCEPTIONS

"SEC. 602. (a) It is a defense to a prosecution under section 601 that before the commission of the offense with which the defendant is charged, the United States had publicly acknowledged or revealed the intelligence relationship to the United States of the individual the disclosure of whose intelligence relationship to the United States is the basis for the prosecution.

"(b)(1) Subject to paragraph (2), no person other than a person committing an offense under section 601 shall be subject to prosecution under such section by virtue of section 2

or 4 of title 18, United States Code, or shall be subject to prosecution for conspiracy to commit an offense under such section.

"(2) Paragraph (1) shall not apply in the case of a person who acted in the course of a pattern of activities intended to identify and expose covert agents and with reason to believe that such activities would impair or impede the foreign intelligence activities of the United States.

"(c) It shall not be an offense under section 601 to transmit information described in such section directly to the Select Committee on Intelligence of the Senate or to the Permanent Select Committee on Intelligence of the House of Representatives.

"(d) It shall not be an offense under section 601 for an individual to disclose information that solely identifies himself as a covert agent.

"PROCEDURES FOR ESTABLISHING COVER FOR INTELLIGENCE OFFICERS AND EMPLOYEES

"SEC. 603. (a) The President shall establish procedures to ensure that any individual who is an officer or employee of an intelligence agency, or a member of the Armed Forces assigned to duty with an intelligence agency, whose identity as such an officer, employee, or member is classified information and which the United States takes affirmative measures to conceal is afforded all appropriate assistance to ensure that

the identity of such individual as such an officer, employee, or member is effectively concealed. Such procedures shall provide that any department or agency designated by the President for the purposes of this section shall provide such assistance as may be determined by the President to be necessary in order to establish and effectively maintain the secrecy of the identity of such individual as such an officer, employee, or member.

"(b) Procedures established by the President pursuant to subsection (a) shall be exempt from any requirement for publication or disclosure.

"EXTRATERRITORIAL JURISDICTION

"SEC. 604. There is jurisdiction over an offense under section 601 committed outside the United States if the individual committing the offense is a citizen of the United States or an alien lawfully admitted to the United States for permanent residence (as defined in section 101(a)(20) of the Immigration and Nationality Act).

"PROVIDING INFORMATION TO CONGRESS

"SEC. 605. Nothing in this title may be construed as authority to withhold information from the Congress or from a committee of either House of Congress.

"DEFINITIONS

"SEC. 606. For the purposes of this title:

"(1) The term 'classified information' means information or material designated and clearly marked or clearly represented, pursuant to the provisions of a statute or Executive order (or a regulation or order issued pursuant to a statute or Executive order), as requiring a specific degree of protection against unauthorized disclosure for reasons of national security.

"(2) The term 'authorized', when used with respect to access to classified information, means having authority, right, or permission pursuant to the provisions of a statute, Executive order, directive of the head of any department or agency engaged in foreign intelligence or counterintelligence activities, order of any United States court, or provisions of any rule of the House of Representatives or resolution of the Senate which assigns responsibility within the respective House of Congress for the oversight of intelligence activities.

"(3) The term 'disclose' means to communicate, provide, impart, transmit, transfer, convey, publish, or otherwise make available.

"(4) The term 'covert agent' means—

"(A) an officer or employee of an intelligence agency or a member of the Armed Forces assigned to duty with an intelligence agency—

"(i) whose identity as such an officer, employee, or member is classified information, and

"(ii) who is serving outside the United States or has within the last five years served outside the United States; or

"(B) a United States citizen whose intelligence relationship to the United States is classified information, and—

"(i) who resides and acts outside the United States as an agent of, or informant or source of operational assistance to, an intelligence agency, or

"(ii) who is at the time of the disclosure acting as an agent of, or informant to, the foreign counterintelligence or foreign counterterrorism components of the Federal Bureau of Investigation; or

"(C) an individual, other than a United States citizen, whose past or present intelligence relationship to the United States is classified information and who is a present or former agent of, or a present or former informant or source of operational assistance to, an intelligence agency.

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"(5) The term 'intelligence agency' means the Central Intelligence Agency, a foreign intelligence component of the Department of Defense, or the foreign counterintelligence or foreign counterterrorism components of the Federal Bureau of Investigation.

"(6) The term 'informant' means any individual who furnishes information to an intelligence agency in the course of a confidential relationship protecting the identity of such individual from public disclosure.

"(7) The terms 'officer' and 'employee' have the meanings given such terms by sections 2104 and 2105, respectively, of title 5, United States Code.

"(8) The term 'Armed Forces' means the Army, Navy, Air Force, Marine Corps, and Coast Guard.

"(9) The term 'United States', when used in a geographic sense, means all areas under the territorial sovereignty of the United States and the Trust Territory of the Pacific Islands.

"(10) The term 'pattern of activities' requires a series of acts with a common purpose or objective.".

(b) The table of contents at the beginning of such Act is amended by adding at the end thereof the following:

"TITLE VI—PROTECTION OF CERTAIN NATIONAL SECURITY INFORMATION

Senator DENTON. Senator Chafee, would you offer your opening statement, please, sir?

STATEMENT OF HON. JOHN H. CHAFEE, A U.S. SENATOR FROM THE STATE OF RHODE ISLAND

Senator CHAFEE. Thank you, Mr. Chairman, and members of the committee.

First I want to say that I appreciate a great deal, Mr. Chairman and members, that you have moved expeditiously with this piece of legislation that I consider of great importance.

Mr. Chairman, S. 391 is essentially the same as S. 2216 as it was reported from the Senate Intelligence Committee in August of last year by a vote of 13 to 1. The only changes are the numbering of the title and the paragraphs.

The purpose of the Intelligence Identities Protection Act is to strengthen the intelligence capabilities of the United States by prohibiting the unauthorized disclosure of information identifying certain American intelligence officers, agents, and sources of information. In short, the bill places criminal penalties on those enemies of the American intelligence community engaged in the pernicious activity of naming names.

In my judgment, the governmental protection of the identities of American intelligence officers is an idea whose time has come and indeed it is long overdue. As has been mentioned in previous remarks, others have made efforts in this field. My colleague, Senator Bentsen, introduced bills which would accomplish this purpose in 1976 and 1977, following the tragic murder of Richard Welch in Athens in December 1975.

I might say, Mr. Chairman, that Richard Welch was born and raised in Providence, R.I. So I have a deep personal, as well as an official interest in preventing the reoccurrence of events such as that.

In 1979, Representative Boland, chairman of the House Intelligence Committee, introduced a House bill which was the predecessor of H.R. 4, which has been introduced this year. In January of last year, S. 2216, the bill I previously referred to, was introduced on the Senate side, and its subsequent refinement and alteration is this bill we are considering today, namely S. 391.

Extensive hearings have been held on the issue of intelligence identities protection in both the House and the Senate Intelligence Committees, and before the Judiciary Committee. The issues which this legislation involves have been heard in detail, and the wording of S. 391 has been carefully amended and refined in its current state.

The point I am making, Mr. Chairman and members of the committee, is: This is no draft bill that we are submitting that has been conjured out of thin air. This is the result of a long, definite effort covering many years with hearings in the Intelligence Committees in the House and the Senate on this subject.

The Republican Party platform in 1980 contained a plank supporting legislation "to invoke criminal sanctions against anyone who discloses the identities of U.S. intelligence officers." Mr. William Casey and Admiral Turner have both publicly expressed their

support for intelligence identities protection, and of course I am delighted that Mr. Casey will be testifying this morning.

Our bill, this one we are considering today, is the only one to receive the endorsement of both the Reagan and the Carter administrations' Justice Departments. Support for this legislation also comes from a broad, bipartisan base of Senators with extensive knowledge and experience in intelligence and national security affairs.

This bill has currently over 40 cosponsors from both sides of the aisle, 10 of whom are committee chairmen, and 30 of whom chair subcommittees. I am particularly pleased that the distinguished Majority Leader, Senator Baker is also an original cosponsor of this bill, as well as Chairman Thurmond and Chairman Goldwater of the Senate Intelligence Committee.

Mr. Chairman, the expeditious passage of this legislation in my judgment is vital to the lives and safety of those Americans who serve this Congress and this Nation on difficult and dangerous missions abroad.

Now, Mr. Chairman, opponents of this legislation prevented its coming to the floor of the Senate last year in the closing hours. As a result, the 96th Congress completed its business without offering us the opportunity for free debate and vote. Since that time, I am told that the Covert Action Information Bulletin has published additional names of alleged covert agents, and their editors have traveled abroad to pursue this pernicious activity. As a consequence, six Americans were expelled from Mozambique recently following charges of engaging in espionage there.

A great deal of debate has centered on the constitutional issues of intelligence identities legislation. The American Civil Liberties Union, for example, recently referred to this sort of legislation as "a violation of the first amendment."

The section of the first amendment to the Constitution that pertains to our discussion states that: "Congress shall make no law * * * abridging the freedom of speech, or of the press * * *." The first point that I wish to make with regard to this amendment is the provisions of the Bill of Rights cannot be applied with absolute literalness; but are subject to exceptions.

It has long been recognized that the free speech clause of the Constitution cannot wipe out common law regarding obscenity, profanity, and the defamation of individuals. This point was reiterated by Justice Oliver Wendell Holmes in the classic Espionage Act decisions in 1919 when he stated:

> The first amendment * * * obviously was not intended to give immunity for every possible use of language * * *. The most stringent protection of free speech would not protect a man in falsely shouting fire in a theater and causing a panic.

A second and equally important point is that if unlimited speech interferes with the legitimate purposes of Government, there must be some point at which the Government can step in. My uncle, Zechariah Chafee, who was the leading defender of free speech during his 37 years at the Harvard Law School, wrote in his book entitled "Free Speech in the United States" as follows:

> The true meaning of freedom of speech seems to be this. One of the most important purposes of society and government is the discovery and spread of truth on subjects of general concern. This is possible only through absolutely unlimited discussion * * *. Nevertheless, there are other purposes of government, such as

order, the training of the young, protection against external aggression. Unlimited discussion sometimes interferes with these purposes, which must be balanced against freedom of speech.

Or to put the matter another way, it is useless to define free speech by talk about rights. * * * Your right to swing your arms ends just where the other man's nose begins.

The true boundary line of the first amendment can be fixed only when Congress and the course realize that the principle on which speech is classified as lawful or unlawful involves the balancing against each other of two very important social interests, in public safety and in the search for truth.

Thus, our problem of locating the boundary line of free speech is solved. It is fixed close to the point where words will give rise to unlawful acts.

It is evident, Mr. Chairman, that the activity of naming names has given rise to unlawful acts, and that it has endangered the lives and safety of American citizens abroad. I have already mentioned the murder of Richard Welch in Greece. I am sure you also know of the series of assassination attempts in Kingston, Jamaica, following the Covert Action Information Bulletin's publication of the names of 15 alleged CIA officers there last year. What you may not know—and I think this is very important, Mr. Chairman and members of the committee—is how terribly those events have affected the lives of the American officials involved, their wives, and their children.

Mrs. Richard Kinsman, who wrote to me last year on this issue and whose letter I would like to insert into the record, has since stated that her life has been "terribly disrupted" by the assassination attempt on her husband and her family. Her children, one of whose bedrooms was riddled by machinegun bullets, "did not understand why anyone would want to hurt them."

The family has been forced to move several times for reasons of their own personal safety, required to give up jobs, sever friendships, withdraw from and reenter schools, and suffer long periods of separation. They also wonder whether they will ever travel abroad again for any purpose.

I understand that another wife whose home was also the target of an assassination attempt in Jamaica last year was hospitalized for stress disorders following the incident. They have also left Jamaica. It is clear, then, that the personal safety and missions of those named have been placed in jeopardy by naming names.

In the balancing of two important social interests, public safety, and the search for truth, it is clear that the protection of the lives of our agents overseas far outweighs a pattern of activities which identifies and discloses the names of those agents. And I use the term "pattern of activity," Mr. Chairman, because that is the language in section 601(c) of the act.

In this regard, Mr. Chairman, I think it is essential, and it is important to stress, that this bill would not prevent Mr. Philip Agee from publishing the articles contained in his publications, obnoxious though they might be. This bill would only restrain his publication of the names of persons he claims are covert agents.

By the same token, there is nothing in this bill which would prevent Louis Wolf from continuing to publish his Covert Action Information Bulletin which does contain articles purporting to be based on research into U.S. intelligence operations at home and abroad. I wish to stress this: This bulletin can continue to be published. The only impact of this legislation would be on the

section of the bulletin entitled "Naming Names." And here, Mr. Chairman [indicating], is an example of "Naming Names." It sets forth the names of alleged agents serving this Nation and this Congress abroad.

I hope that this brief review of the constitutional questions will show that the first amendment does not provide absolute protection for all speech; and that the Government can in certain circumstances intervene in the exercise of free speech in the interest of public safety without jeopardizing the search for truth.

As the Attorney General stated last year on this subject:

> Our proper concern for individual liberties must be balanced with a concern for the safety of those who serve the Nation in difficult times and under dangerous conditions.

It goes without saying that these important constitutional considerations were very much in our minds when my colleagues and I worked up the final draft of the Intelligence Identities Protection Act. We are not challenging the Constitution. We are working with it. In my judgment, we have worked well within its limits. We have successfully followed what my uncle called the boundary line of free speech.

Mr. Chairman, I will not take the time this morning to discuss the specific provisions of S. 391, or to point out in detail how this formulation reflects our proper concern for first amendment rights. This has been the subject of previous testimony, and others will testify this morning, and it is part of the extensive record on this issue. I recommend the Intelligence Committee's Report on this subject, as well as the published hearing record of both the Intelligence and the Judiciary Committees.

However, there is one additional issue which I believe must be addressed before I conclude my remarks, because there has been so much confusion surrounding it. During the long debate on this issue, and in the hearings before the Senate Intelligence Committee, I have heard it suggested or implied that it should be acceptable for people to disclose the names of covert agents if this information derives from unclassified sources.

The implication of this view is that there exists somewhere in this Government an official but unclassified list of covert agents; and that those who have found this list should be free to publish the names thereon.

Mr. Chairman, I have studied the matter of covert agents within the Senate Intelligence Committee, and have even held a series of detailed hearings on the subject. Without going into specifics in this session, I can assure you that there is no such list. What we have found are unclassified official or semiofficial documents which contain the names of covert agents in among the names of other officials of the U.S. Government. The covert agents are not identified. The very purpose of these documents is to cover or to hide the true identity of the covert agents named thereon, and in no case is an identification explicitly made.

However, to say that the Government has never published an unclassified list of covert agents as such does not mean that certain persons, employing basic principles of counterespionage, and after considerable effort, cannot determine identities of covert agents with some degree of accuracy. It is possible.

It is the purpose of S. 391 to punish the publication of names acquired through these techniques, regardless of whether the identification was made with reference to classified or unclassified material. It is not the mechanism of identification which places people's lives in jeopardy or threatens our intelligence capabilities; it is the actual publication of the names as covert agents that does so. It is the pattern of activity involved in the pernicious business of naming names that we want primarily to prevent.

In closing, Mr. Chairman, I would like to make a special appeal to you and to my colleagues on your committee to report S. 391 intact so that the interminable delays which seem to follow any change to a bill might be avoided. You have my assurance, in turn, that I will do whatever I can to see that this vital bill is moved with the deliberate speed it deserves.

Over the past 5 years, more than 2,000 names of alleged CIA officers have been identified and published by a small group of individuals whose stated purpose is to expose U.S. intelligence operations. I think it is time we legislated an end to this pernicious vendetta against the American intelligence community.

Mr. Chairman, we send fellow Americans, we in the U.S. Congress, members of the U.S. Government, abroad on dangerous missions. We owe it to them to do our utmost to protect their lives as we go about our business.

Finally, Mr. Chairman, it has been my privilege as a member of the Intelligence Committee to have traveled somewhat in different sections of the world. In doing so, I make an attempt to meet with our intelligence agent station chiefs and converse with them, discuss with them their problems, what we might do in the U.S. Senate as Members of the Senate, as members of the Intelligence Committee, to be more helpful to them in discharging their duties.

I can say, Mr. Chairman, that everywhere I go, without question, unanimously the question is raised that the most disconcerting activity that takes place, the most demoralizing activity, is the publication of names in bulletins such as this [indicating]. Our officers find it difficult to understand why nothing can be done about this.

Mr. Chairman, I have a deep personal interest in seeing—and I know this concern is shared by Members of the Committee here and Members of the Senate throughout—to do the best we can to protect the lives of our agents and their families abroad.

Thank you, Mr. Chairman. I would be glad to answer any questions that you might have.

Senator DENTON. Thank you very much, Senator Chafee. Your Uncle Zachariah has spoken very well, and he shall become one of my valuable sources of quotations. We do have the letter from Mrs. Kinsman. I have read it and been much impressed by what that lady had to say.

I will have no questions of our colleague. Would you, Senator Leahy?

Senator LEAHY. I wonder if I just might, Mr. Chairman, with your indulgence, ask a couple of questions. I have been singularly impressed over the past several years that I have been on the Intelligence Committee with how often we as a committee act with complete unanimity. I would say we do so in the vast majority of

circumstances, certainly far, far more than any other committee in the U.S. Senate.

It is interesting, too, because the membership of the Intelligence Community is made up with a very real effort to have a broad ideological, and geographical mix, so it can be truly representative of the U.S. Senate. I know of no issue where the Intelligence Committee has spoken with stronger unanimity than our great concern over the release of the names of our agents worldwide.

The people who serve us in the intelligence agencies around the world—certainly all the ones I have met, and I have done the same thing as you in visiting our people abroad—are dedicated individuals. They are hard working. Many times they are operating under serious disadvantages, personal disadvantages to their family, themselves, in the way they are living and working. Many certainly do not fit the image of a John Le Carré spy novel. They are many times people who carry out what appear to be fairly mundane things, but very necessary; certainly not the type who should be expecting or anticipating being put in great personal danger, and yet they are when their names are bandied about as being the lead person for some American worldwide intelligence apparatus.

These persons may well be working on economic issues or something like that, but suddenly find that they are going to have to defend their lives, and worse yet, defend the lives of their spouses and children.

So there is no question that we want to put an end to the pernicious practice of naming names of our cover intelligence personnel, especially in the case of the Covert Action Information Bulletin where it is being done purposely to impede foreign intelligence activities in the United States.

We all agree absolutely that that has to stop. What I am concerned about is how we do it. The issues of the constitutionality of section 601(c) have been raised. Philip Heymann has suggested different language, and so on.

Maybe it is a philosophical question, John, that I have more than anything else. Do we run a great risk—even a greater risk in some ways—if we passed the bill, and if section 601(c) were to be found unconstitutionally broad? In some ways, is that not a greater risk? If that is the result of this effort, haven't we opened the floodgates, wouldn't it take years to restore any sense of security not only to our own personnel but to those that may act against them?

A number of constitutional scholars have said it would not be constitutional unless it contained an element of malicious intent or bad purpose. Do you think we should adopt that approach?

Senator CHAFEE. First, Mr. Chairman and Senator Leahy, I want to pay tribute to the work you have done on the Senate Intelligence Committee, a very valuable member and you have as great concern in this area as any one member of the committee. I know that you have worked extremely hard to devise an approach in which we might solve this problem which bedevils all of us.

This section 601(c) has had support from the Justice Department. The version that is in the House is somewhat different in that it has an "intent" standard—what the Justice Department calls a "subjective standard of intent," whereas you will notice on line 4 in the bill where it uses the word "intended" in connection with the

"pattern of activities," that is described as an "objective standard of intent," one that is not in the mind but can be weighed objectively.

So in answer to your question, it seems to me that what we have done here is to replace the subjective standard of intent with a more objective standard which requires that the disclosure must be "in the course of a pattern of activities intended to identify and to expose covert agents and with reason to believe that such activities would impair and impede the foreign intelligence activities of the United States."

I do not think it has to be done with any malicious intent, because we have described the action. It is like—I suppose analogies are always dangerous—shooting somebody. You shoot them, and whether you do it with "intent" or not to murder them, it is a "killing" and it is punishable.

Senator LEAHY. But you do recognize philosophically the problem that we would face? That if we were to pass one part of the statute and have it held unconstitutional, that it would almost encourage these activities?

Senator CHAFEE. Well, I do not think so, because I do not think that if this were found unconstitutional—I am not accepting the assumption—but if it were found unconstitutional, I just do not think responsible American citizens are going to go out and say: Three cheers! We can now publish all the names of all the agents we can discover, and we will do it freely.

I mean, I do not believe that the mass majority of Americans are going to do this. There is a limited group that is doing it now. But it is enough to cause damage.

Senator LEAHY. Well, let me take Mr. Agee and Mr. Wolf's activities. Would those not fall clearly within that "bad purposes" test, the test suggested by Mr. Heymann, and by the House language?

Senator CHAFEE. I am not sure I get your question.

Senator LEAHY. Well, would not the kind of thing that we seem to be zeroing in on, would not that fall under the more restrictive language that has been suggested by the Department of Justice and suggested by the House bill?

Senator CHAFEE. Well, the Department of Justice approves this language.

Senator DENTON. If you would yield, sir?

Senator LEAHY. Sure.

Senator DENTON. The delay which I mentioned was due to their consideration of the wording, and the ultimate judgment was in favor. There is total confidence that it is constitutional.

Senator LEAHY. Let me go to another question. How does this affect those things that seem to pervade all administrations, Republicans and Democrats, the so-called authorized leak? So I will not appear to be partisan, I will just take the last 4 years. There was one person at a high level in the administration who appeared to virtually have a member of one of the larger newspapers in this country on his payroll given the way leaks would flow through to him. We sometimes had to hurriedly schedule meetings of our intelligence committees so that we could be briefed by the intelligence community prior to—or at least within a few days of having

read the same material on the front page of that particular newspaper. Does this bill involve that sort of thing?

Senator CHAFEE. This solely deals with "names."

Senator LEAHY. Then let me just ask you one last question, because I understand that the "pattern" could be a series of events leading up to just one publication; it does not necessarily mean by a "pattern" a series of publications, but a series of events, rather, that may lead to just one publication.

We heard testimony here on the origins and support of international terrorism in this subcommittee recently. We had Claire Sterling, the journalist Michael Ledeen, and Arnold De Borchgrave. Now all of these authors have named a source who could fall under the definition of "covert agent" contained in the bill. They used that source to make their case that the Soviet Union was supporting international terrorism.

Now I do not believe by any stretch of the imagination that any of these authors wrote with the intent of impairing or impeding the effectiveness of the foreign intelligence activities of the United States. But they were all told, as I understand it, by U.S. Government sources, that they were wrong in their conclusions.

Now could the objective standard of "with reason to believe that such activities would impair or impede the foreign intelligence activities in the United States" have had a chilling effect on their ability to use and name a high-caliber source to prove a point which the U.S. Government continues to deny?

Senator CHAFEE. Well, I do not know the facts of that exact case, but there are a whole series of hurdles that have got to be overcome before you can achieve a successful prosecution under this section 601(c). There are six of them.

First, that there was an intentional disclosure which did in fact identify a covert agent.

Second, that the disclosure was made to an individual not authorized to receive classified information.

Third, that the person who made the disclosure knew the information identified a covert agent.

Fourth, that the person who made the disclosure knew that the United States was taking affirmative measures to conceal the agent's classified intelligence affiliation.

Fifth, that the disclosure was made in the course of a pattern of activities.

And sixth, that the person making the disclosure had reason to believe that his activities would impair or impede the foreign intelligence activities of the United States.

Now those are pretty big hurdles to jump.

Senator LEAHY. I understand. I can think of things I have read—well, to be totally bipartisan about it—things I have read in the last 6 years since I have been in the Senate, based on the knowledge that I had first in the Armed Services Committee and then on the Intelligence Committee, material that has gone from high administration officials, both Republican and Democratic administrations, directly to members of leading news media in this country that would fall under every one of those tests, and were published in the newspapers or within the electronic media. The leaks came

directly by high officials of both Republican and Democratic administrations that fall directly under that.

Senator CHAFEE. With the names? I think that is probably the difference.

Senator LEAHY. Well, the definition of "names," if you use a source that could only be one conceivable person that it could come from, or one conceivable place that it could come from, that is the same as the name.

Senator DENTON. If the Senator would yield, I do have two specific pieces of answers to two previous questions he made reference to.

One is the mentioning of names by Messrs. de Borchgrave and Ledeen and Mrs. Sterling. In every case which we know of, the names named were all taken from foreign sources, meaning that the agencies inimical to our interests already had the names. This Department of Justice ruling was dated February 25. We did not get it until about the last part of March. But one sentence which does directly address your question about "with reason to believe"—that is, the constitutionality or advisability of that—the relevant quote says: "The Department supports Section 601(3)(c)'s requirement that an individual must act with reason to believe that such activities would impair or impede the foreign intelligence activities of the United States." They go on to say that: "This is preferable to the House version of the bill, H.R. 4, which requires that an individual must act with the intent to impair or impede the foreign intelligence activities of the United States."

For what it is worth, those are the closest responses I can make to those two questions.

With regard to the high officials leaking names, if that is what we are getting into I am personally interested in trying to tighten up the punitive measures which might deter such leaks when they are against the security of the United States.

Senator LEAHY. Unfortunately, administrations have for years leaked when they think it is to their benefit. We usually catch hell for it up here, because people start talking about all the leaks from Congress. With respect to the Intelligence Committee at least, I know of no leak that has ever come out of that committee; but I know of an awful lot of hours of frustration that both Senator Chafee and I have expressed at leaks that have come elsewhere.

I realize, Mr. Chairman, that you have an awful lot of other witnesses, and I will forego any other questions. I simply want to establish the fact that there is certainly unanimity within the Senate on the desire to protect the names of agents. We do not want our agents' names bandied about. They are operating under enough problems as it is. Their own safety, the safety of their families is going to become more and more difficult, and it is already becoming more and more difficult to recruit good men and women for a job that is absolutely essential to the security of the United States. I think that good intelligence, properly used, is one of the best guarantees of freedom in the world, and one of the best guarantees that we do not stumble into such things as what would be the worst case, of course, an accidental nuclear war.

So we must have it, and we must protect the identity and the safety of those agents. But I also want to make sure, however, that

in doing so we do not infringe, first, on the basic constitutional rights that we are ultimately trying to protect for all of us. And second, that we do not pass legislation which may ultimately be overturned, for whatever reason; because I think that that would exacerbate the situation even further.

So we are all striving for the same end, and I raise the questions to make sure that when we finally come out with a bill it will be the best one possible. And I compliment Senator Chafee on this. I think in the Intelligence Committee he has been a yoeman in the work that he has done in trying to educate all the rest of us, Mr. Chairman, in working with us and in trying to bring together the disparate views on the whole subject.

Thank you.

Senator CHAFEE. Well, thank you, Senator Leahy. Again, I appreciate the efforts that you are making, along with all the rest of us, to arrive at a successful solution to this problem.

I would just conclude by making two brief points. First, the whistleblower problem is taken care of on page 4 of section 601(c) where it does provide that it is perfectly permissible to go to the Intelligence Committees, as you pointed out.

Second, in some of the testimony we had last year the point was made by opponents to this act that there have been all of these publications of names—and I think I mentioned in my testimony some 2,000 names—and only 1 person has been murdered, and only 1 agent has been murdered, and only 1 house or a few houses have been shot up, so why bother passing legislation?

To me, Mr. Chairman, I do not buy that argument. First of all, I do not think anybody should be murdered or endangered. But second, and I am sure you can adduce this from the testimony of the Director, the effect of these names on our ability to function has been severe. Regardless of whether it is a murder of an agent or not, or the shooting up of a home, the deleterious effect on our intelligence operations has been severe.

So I just hope that no one succumbs to the argument that there have been 2,000 names, and only 1 person murdered, so why bother?

Senator LEAHY. I do not think anybody is going to buy that argument here.

Senator CHAFEE. I do not think any of us will take that argument.

Senator DENTON. And we recognize that, aside from the loss of life or the injury to individuals, the neutralization of their function by revealing their names, is a deleterious effect on our security.

Thank you very much, Senator Chafee, for your testimony here this morning.

Senator CHAFEE. Thank you, Mr. Chairman. I appreciate it.

Senator DENTON. Mr. Casey has a Cabinet meeting at 11:30, and we are going to try to expedite our questions so that he will be prompt in making that meeting.

We will ask William J. Casey, the Director of the Central Intelligence Agency, to come forward. Would you wish, Mr. Casey, your two colleagues to accompany you? John Stein, Acting Deputy Director of Operations, and Fred Hits, Legislative Counsel for the CIA.

STATEMENT OF WILLIAM J. CASEY, DIRECTOR, U.S. CENTRAL INTELLIGENCE AGENCY, ACCOMPANIED BY JOHN H. STEIN, ASSOCIATE DEPUTY DIRECTOR FOR OPERATIONS, CIA; AND FRED HITS, LEGISLATIVE COUNSEL, CIA

Mr. CASEY. I am pleased to be here, and I would ask that my prepared statement be inserted in the record, and I will give you the gist of my statement orally.

Senator DENTON. It shall be done, sir.

Mr. CASEY. Early last month I appeared before the House Intelligence Committee on legislation and testified on the House version of this bill. With both chambers considering this legislation, I am very hopeful that we will soon see enactment of a measure that will finally put an end to the pernicious and damaging unauthorized disclosures of intelligence identities.

We need criminal penalties as soon as possible on the unauthorized disclosure of information identifying certain individuals engaged or assisting in the foreign intelligence activities of the United States. This administration believes that the passage of the Intelligence Identities Protection Act is essential to the maintenance of a strong and effective intelligence apparatus. Enactment of this legislation is vital to President Reagan's determination and commitment to enhance the Nation's intelligence capabilities.

Mr. Chairman, there exists a tiny group of Americans who openly proclaim themselves to be devoted to the destruction of the Nation's foreign intelligence agencies. This group has engaged in activities avowedly aimed at undermining the Nation's intelligence capability through the identification and exposure of undercover intelligence officers.

Those perpetrating these disclosures understand correctly that secrecy is the lifeblood of an intelligence organization, and that disclosure of the individuals engaged in that activity and whose identity is deliberately concealed will disrupt, discredit, and they hope ultimately destroy an agency such as the CIA.

Some of the persons engaged in this activity have actually traveled to foreign countries with the aim of stirring up local antagonism to U.S. officials through thinly veiled incitements to violence.

Mr. Chairman, I might say that since taking the post of Director of the Central Intelligence Agency only a few months ago, I can confirm that these disclosures have resulted in untold damage and, if not stopped, will result in further damage to the effectiveness of our intelligence apparatus and to the Nation itself.

I am appalled at the degree to which concerted activity is being carried out around the world to destroy the capacity which is critical to our national security, and which has been painstakingly developed over many years with the full participation and support of the Congress and an investment of many billions of dollars.

The traggic results of these unauthorized disclosures have been reviewed by Senator Chafee so well that I will not take your time to go into all the details, except to say that just a few weeks ago six Americans were expelled from Mozambique following charges of engaging in espionage. These expulsions followed and were directly attributable to visits to that country by members of the Cuban Intelligence Service and the editors of the Covert Action Information Bulletin.

So this is a continuing threat that hangs over our heads which can result in serious damage, increasing discouragement, and retirements of people engaged in this activity who have developed years of experience which is enormously valuable to our national security.

Mr. Chairman, I do not think it necessary to go into great detail about the adverse effects that these disclosures are having. Simply put: The credibility of our country and its relationship with foreign intelligence services and individual human sources, the lives of patriotic Americans serving their country, and the effectiveness of our entire intelligence apparatus are being placed in jeopardy daily.

Extensive hearings before the House and Senate Intelligence and Judiciary Committees have documented these damaging effects. The underlying basic issue is the fact that our ability to continue to recruit and retain human sources of intelligence whose information could be crucial to the Nation's survival in an increasingly dangerous world, our equally important relations with the intelligence services of other nations, are in continuing jeopardy as long as we are exposed to this threat.

It is important to understand what legislation in this area seeks to accomplish. It seeks to protect the secrecy of the participation or cooperation of certain persons in the Foreign Intelligence Service of the United States. These are activities which have been authorized by the Congress, activities which we as a nation have determined to be essential. Secrecy is essential to the safety and effectiveness of the case officers and the agents, without which no intelligence service can operate. It is essential to get individuals to undertake this delicate, demanding, and frequently dangerous work.

No existing statute clearly and specifically makes the unauthorized disclosures of intelligence identities a criminal offense. As matters now stand, the impunity with which unauthorized disclosures of intelligence identities can be made implies a Government position of neutrality, of not caring about the matter. It suggests that U.S. intelligence officers are fair game for those members of our own society who take issue with the existence of the CIA, or find other perverse motives for making these unauthorized disclosures.

I might say that other intelligence services around the world, and other nations, the leaders of other nations, witness this continuing specter where the United States leaves its people who have undertaken this work exposed to this kind of risk and look at it with amazement. You hear it wherever you go.

I believe it is important to emphasize that the legislation which you are considering today is not an assault on the first amendment. It would not inhibit public discussion and debate about U.S. foreign policy or intelligence activities. It would not operate to prevent the exposure of allegedly illegal activities or abuses of authority. It is carefully crafted and narrowly drawn to deal with conduct which serves no useful informing function whatsoever. It is not related to alleged abuses. It does not bring clarity to issues of national policy. It does not enlighten public debate. It does not contribute to an enlightened and informed electorate.

Mr. Chairman, there is virtually no serious disagreement over those provisions of this legislation which impose criminal penalties on the unauthorized disclosure of intelligence identities by those individuals who have had authorized access to classified information. Controversy has centered on subsection 601(c) of S. 391 which imposes criminal penalties on the disclosure of information identifying a covert action by anyone under certain specified conditions.

Disclosure of intelligence identities by persons who have not had authorized access to classified information will be punishable only under certain specified conditions which have been carefully crafted and narrowly drawn so as to encompass persons only engaged in an effort or pattern of activities designed to identify and expose intelligence personnel and impair our intelligence capabilities thereby.

The proposed legislation also contains offenses and exceptions which reinforce this narrow construction. It is instructive in this regard to look at the elements of proof that would be required in a prosecution under this section, keeping in mind that the Government would have to prove each of these elements beyond a reasonable doubt.

The Government would have to show that there was an intentional disclosure of information which did in fact identify a cover agent;

That the disclosure was made to an individual not authorized to receive classified information;

That the person who made the disclosure knew that the information disclosed did in fact identify a covert agent;

That the person who made the disclosure knew that the United States was taking affirmative measures to conceal the covert agent's classified intelligence affiliation;

That the individual making the disclosure did so in the course of a pattern of activity intended to identify and expose a covert agent;

And that the disclosure was made "with reason to believe that such activities would impair or impede the foreign intelligence activities of the United States."

Because of these strict conditions which narrowly define the prohibited conduct, I believe it is clear that this subsection is directed at conduct which the Congress has the authority and power to proscribe consistent with the first amendment, and that this bill does so in a constitutional manner.

Mr. Chairman, I understand that the Department of Justice believes that the Senate version of the bill better captures the concerted nature of the activity which is intended to be proscribed than does the House bill, and that there are prosecutorial and evidentiary advantages to the Senate language. I believe the Department's witness will speak to this matter.

Mr. Chairman, S. 391 will deal with a clear and immediate danger which currently each and every day endangers our intelligence activities, our staff officers, and the lives of those who are cooperating with our Nation abroad.

I want to express my gratitude and appreciation to the subcommittee for so promptly bringing this legislation forward, and to reiterate the hope that it will be enacted into law as quickly as

possible so that this intolerable situation is remedied and no longer permitted to exist.

I will be happy, Mr. Chairman, to answer any questions that you or anybody else may have.

Senator DENTON. Thank you, Mr. Casey, for your most expert and helpful testimony. I will be very brief in my questioning in view of your time constraints.

Let me say at the outset that, while you have evinced your sense of being appalled at the situation which we are now addressing—with such incredible tardiness—from my own background and personal contact with high-ranking Communists, I can assure you that they too are amazed, amused, and highly pleased that such a situation exists.

I did hear you say, sir, that there is no existing legislation which adequately deals with the problems of disclosure which S. 391 is formulated to address. May I ask what steps, if any, the CIA may have taken to tighten up its security practices and cover for its own agents and sources? And would the Agency develop standards for cover sufficient to protect its covert employees from identification, if this bill is passed and prosecuted properly?

Mr. CASEY. Well, we take extensive precautions to equip our agents, and indeed our case officers with cover and identities which facilitate the conduct of their task that is assigned to them, and to protect them from both disclosure and identification by foreign intelligence services, and disclosure and violence from any source.

Senator DENTON. Can congressional oversight and legitimate official and unofficial scrutiny of intelligence activities take place without the likely revelation of intelligence identity?

Mr. CASEY. Well, our experience with congressional oversight and the informing of the relevant committees about our proposed and actual operations has not resulted in any serious disclosure at all, as far as I know. Much of the conversation which takes place with the committees generally describes what we intend to do and the risks and other things that may be involved that seem relevant to the adequate understanding and proper oversight, and very unusually does it take us into identifying the particular individuals who will undertake the particular mission. So I do not see any risk there at all for the oversight process.

Senator DENTON. My final question, sir. I am not a lawyer, but I cannot help but be somewhat impressed that the offense which we are trying to establish as culpable would only result in a punishment of a fine not to exceed $15,000 and imprisonment of not more than 3 years or both. This seems inadequate considering the deaths which have resulted and the harm to our national security which can be translated in terms of peacetime terroristic activities or wartime situations into deaths.

In your opinion, are the penalties provided in S. 391 sufficient or severe enough for the proscribed activities mentioned in the bill?

Mr. CASEY. Well, I would not be opposed to more severe penalties. I believe, however, the fundamental requirement is that we establish the illegality of this action, the criminal nature of this activity, and that we do that as promptly as possible. So I would not be inclined to encourage the imposition of more severe penal-

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ties if that were to result in a delay in the enactment of the legislation.

Senator DENTON. I entirely agree, sir.

Senator Leahy?

Senator LEAHY. Thank you, Mr. Chairman.

Mr. Casey, I am always delighted to see you before any of our committees. I would also want to commend your department for some help that they provided for me and my staff during the past few weeks. It was extremely well done and very professionally done, and I appreciate it.

Mr. CASEY. Your visits were very helpful to the morale and spirit of our people.

Senator LEAHY. Thank you, sir.

I found an interesting thing in preparing for this that the American Civil Liberties Union and the Heritage Foundation in what was probably an historic moment held hands on one major item; that they feel that the issue is not so much disclosure made by the press or public, but the question of adequate cover for intelligence officers abroad, something touched on by the chairman earlier.

I am concerned about that, as I know you are and I know others here, I see Mr. Maury in the audience, and others who have expressed the same concern in one regard or another. I know that many agents' identities have been uncovered through the use of the State Department's "Biographic Register," I must admit an item that I was not aware of until I got on the committee and started looking through a copy of it. I understand that register is no longer in general circulation, but it is still published as an unclassified document.

Have you discussed the problem this might create with Secretary Haig?

Mr. CASEY. Yes, I have, Senator. I think generally speaking we are getting a high degree of cooperation on the provision of official cover. There has been some thought of resuming the publication of the State Department's "Biographical Register," and that is under discussion now, the impact it would have or might have on protecting cover. I think we will get full cooperation in the executive branch with respect to all steps necessary to provide maximum cover.

Senator LEAHY. It occurs to me that both the ACLU and the Heritage Foundation are correct in suggesting that no matter what kind of laws we might have, if we do not have adequate cover there is always going to be somebody, for one reason or other, who is just going to look to something which is relatively easy to decipher and make a big thing out of just passing out the deciphered information, no matter what their motivation might be.

Mr. CASEY. Even the State Department's "Biographic Register" took a certain amount of interpretation. It was not always accurate; but with the nature of this kind of activity, it does not really matter too much whether it is accurate or inaccurate, insofar as the damage it imposes and the disrespect and impairment of morale it creates. So the publication of false information is almost as damaging as the publication of the correct information.

It is really the pattern of activity that I think the legislation will address, and the thing that needs to be proscribed.

Senator LEAHY. Do you know, or has your office come across cases where the names of agents were disclosed with reason to believe that that disclosure would impair or impede the foreign intelligence activities of the United States, but at the same time felt that the person did so without any intent of neutralizing the agent or impairing our intelligence activities?

Mr. CASEY. Well, I think that there has been occasional publication in the press which divulged the name in the course of writing an article intended to generally inform the public; yes. I do not believe that that kind of a one-shot publication would be reached by this legislation, which it is clearly not designed to reach.

This bill goes to the active use of the information for a particular purpose in a particular way. As Senator Chafee's distinguished uncle put it.

It is not the swinging of the arm that is proscribed; it is the smashing of the nose.

Senator LEAHY. But you also agreed, however, that under this law we could be dealing simply with one publication, but a series of events leading up to it.

Mr. CASEY. Well, we could be; yes. There you have got "acted in the course of a pattern of activities intended to identify and expose." Unless the primary purpose is to divulge a single agent's name, I do not think it would be reached. You have to have a course or a pattern of activities intended to identify.

Senator LEAHY. But it could be one disclosure, but a pattern of activities leading up to one disclosure.

Mr. CASEY. The disclosure I think would have to be part of a pattern of activities.

Senator LEAHY. But it could be a single exposure.

Mr. CASEY. It could be a single publication.

Senator LEAHY. I may have other questions, Mr. Chairman, but I will submit them for the record. I know the Director has to go to a Cabinet meeting.

Senator DENTON. Thank you.

And I think I should communicate here that Senator Biden is delayed because of a train accident, all the trains being held up. He will be here as soon as possible.

We would like to thank you very much, Mr. Casey, and hope that you get to your Cabinet meeting on time, sir.

Mr. CASEY. I appreciate it very much. Thank you.

[Prepared statement of William J. Casey follows, plus responses to questions by Senator Leahy:]

PREPARED STATEMENT OF WILLIAM J. CASEY

DIRECTOR OF CENTRAL INTELLIGENCE

Mr. Chairman, Members of the Subcommittee, I am pleased to be appearing before the Subcommittee on Security and Terrorism, which is considering S. 391, the "Intelligence Identities Protection Act." Early last month, I appeared before the House Intelligence Subcommittee on Legislation to testify on the House version of the Bill. With both chambers considering this legislation I am hopeful that we will soon see enactment of a measure which will finally put an end to the pernicious and damaging unauthorized disclosures of intelligence identities.

The Intelligence Community's support for legislation to provide criminal penalties for the unauthorized disclosure of information identifying certain individuals engaged or assisting in the foreign intelligence activities of the United States is well known. I want to emphasize that this Administration believes that passage of the "Intelligence Identities Protection Act" is essential to the maintenance of a strong and effective intelligence apparatus. Enactment of this legislation is an important component of the Administration's effort to implement President Reagan's determination to enhance the nation's intelligence capabilities.

Mr. Chairman, there exists a coterie of Americans who have openly proclaimed themselves to be devoted to the destruction of the nation's foreign intelligence agencies. This group has engaged in actions avowedly aimed at undermining the nation's intelligence capabilities through the identification and exposure of undercover intelligence officers. The perpetrators of these disclosures understand correctly that secrecy is the life blood of an intelligence organization and that disclosures of the identities of individuals whose intelligence affiliation is deliberately concealed can disrupt,

discredit and--they hope--ultimately destroy an agency such as the CIA. Some of the persons engaged in this activity have actually traveled to foreign countries with the aim of stirring up local antagonism to U.S. officials through thinly veiled incitements to violence. Mr. Chairman, I might say that since taking the position of Director of Central Intelligence only a few months ago I can confirm that these unauthorized disclosures have resulted in untold damage, and, if not stopped, will result in further damage to the effectiveness of our intelligence apparatus, and hence to the nation itself. I might also say that I am appalled at the degree to which concerted activity is being carried out around the world to destroy a capacity which is critical to our national security and which has been painstakingly developed over many years with the full participation of the Congress and an investment of billions of dollars.

The tragic results of unauthorized disclosures of intelligence identities are well known. Five years ago, Richard Welch was murdered in Athens, Greece. Last July, only luck intervened to prevent the death of the young daughter of a U.S. Embassy officer in Jamaica whose home was attacked only days after one of the editors of a publication called Covert Action Information Bulletin appeared in Jamaica, and at a highly publicized news conference gave the names, addresses, telephone numbers, license plates, and descriptions of the cars of U.S. government employees whom he alleged to be CIA officers. Most recently, six Americans were expelled from Mozambique following charges of engaging in espionage. These expulsions followed visits to that country by members of the Cuban intelligence service and the editors of the Covert Action Information Bulletin.

Extensive hearings before the Senate and House Intelligence Committees and before the two Judiciary Committees during the

96th Congress documented the pernicious effects of these unauthorized disclosures. Obviously, security considerations preclude my confirming or denying specific instances of purported identification of U.S. intelligence personnel. Suffice it to say that a substantial number of these disclosures have been accurate. Unauthorized disclosures are undermining the Intelligence Community's human source collection capabilities and endangering the lives of our intelligence officers in the field. The destructive effects of these disclosures have been varied and wide ranging.

Our relations with foreign sources of intelligence have been impaired. Sources have evinced increased concern for their own safety. Some active sources and individuals contemplating cooperation with the United States have terminated or reduced their contact with us. Sources have questioned how the U.S. Government can expect its friends to provide information in view of continuing disclosures of information that may jeopardize their careers, liberty, and very lives.

Many foreign intelligence services with which we have important liaison relationships have undertaken reviews of their relations with us. Some immediately discernible results of continuing disclosures include reduction of contact and reduced passage of information. In taking these actions, some foreign services have explicitly cited disclosures of intelligence identities.

We are increasingly being asked to explain how we can guarantee the safety of individuals who cooperate with us when we cannot protect our own officers from exposure. You can imagine the chilling effect it must have on a source to one day discover that the individual with whom he has been in contact has been openly identified as a CIA officer.

The professional effectiveness of officers so compromised is substantially and sometimes irreparably damaged. They must

reduce or break contact with sensitive covert sources. Continued contact must be coupled with increased defensive measures that are inevitably more costly and time consuming.

Some officers must be removed from their assignments and returned from overseas at substantial cost. Years of irreplaceable area experience and linguistic skills are lost. Reassignment mobility of the compromised officer is impaired.

As a result, the pool of experienced CIA officers available for specific overseas assignments is being reduced. Such losses are deeply felt in view of the fact that, in comparison with the intelligence services of our adversaries, we are not a large organization. Replacement of officers thus compromised is difficult and, in some cases, impossible.

Once an officer's identity is disclosed, moreover, counterintelligence analysis by adversary services allows the officer's previous assignments to be scrutinized, producing an expanded pattern of compromise through association.

Such disclosures also sensitize hostile security services and foreign populations to CIA presence, making our job far more difficult. Finally, such disclosures can place intelligence personnel and their families in physical danger from terrorist or violence-prone organizations.

It is also essential to bear in mind that the collection of intelligence is something of an art. The success of our officers overseas depends to a very large extent on intangible psychological and human chemistry factors, on feelings of trust and confidence that human beings engender in each other and on atmosphere and milieu. Unauthorized disclosure of identities information destroys that chemistry.

Mr. Chairman, I do not think it is necessary or advisable to go into greater detail about the adverse effects that unauthorized disclosures of intelligence identities are having on the work of our nation's intelligence agencies. Simply put,

the credibility of our country and its relationships with foreign intelligence services and individual human sources, the lives of patriotic Americans serving their country, and the effectiveness of our intelligence apparatus are all being placed in jeopardy. The underlying basic issue is the fact that our ability to continue to recruit and retain human sources of intelligence whose information could be crucial to the nation's survival in an increasingly dangerous world, and our equally important relations with the intelligence services of other nations are in continuing jeopardy.

It is important to understand what legislation in this area seeks to accomplish: It seeks to protect the secrecy of the participation or cooperation of certain persons in the foreign intelligence activities of the U.S. Government. These are activities which have been authorized by the Congress; activities which we, as a nation, have determined are essential. No existing statute clearly and specifically makes the unauthorized disclosure of intelligence identities a criminal offense. As matters now stand the impunity with which unauthorized disclosures of intelligence identities can be made implies a governmental position of neutrality in the matter. It suggests that U.S. intelligence officers are "fair game" for those members of their own society who take issue with the existence of CIA or find other perverse motives for making these unauthorized disclosures.

Mr. Chairman, I believe it is important to emphasize that the legislation which you are considering today is not an assault upon the First Amendment. The "Intelligence Identities Protection Act" would not inhibit public discussion and debate about U.S. foreign policy or intelligence activities, and it would not operate to prevent the exposure of allegedly illegal activities or abuses of authority. The legislation is carefully crafted and narrowly drawn to deal with conduct which serves no useful informing function whatsoever; does not alert us to alleged abuses; does not bring clarity to issues of national policy; does not enlighten

public debate; and does not contribute to an educated and informed electorate.

The Bill creates three categories of the offense of disclosure of intelligence identities:

a. Disclosure of information identifying a "covert agent" by persons who have or have had authorized access to classified information that identifies such a covert agent. This category covers primarily disclosure by intelligence agency employees and others who get access to classified information that directly identifies "covert agents";

b. Disclosure of information identifying a "covert agent" by persons who have learned the identity as a result of authorized access to classified information. This category covers disclosures by any person who learns the identity of a covert agent as a result of government service or other authorized access to classified information that may not directly identify or name a specific "covert agent;" and

c. Disclosure of information identifying a "covert agent" by anyone, under certain specified conditions outlined below.

There is virtually no serious disagreement over the provisions of the legislation which provide criminal penalties for the unauthorized disclosure of intelligence identities by individuals who have had authorized access to classified information. Controversy has centered around subsection 601(c) of S. 391.

Disclosures of intelligence identities by persons who have not had authorized access to classified information would be punishable only under specified conditions, which have been carefully crafted and narrowly drawn so as to encompass only persons engaged in an effort or pattern of activities designed to identify and expose intelligence personnel. The proposed legislation also

contains defenses and exceptions which reinforce this narrow construction. It is instructive, in this regard, to look at the elements of proof that would be required in a prosecution under subsection 601(c) of S. 391, keeping in mind that the government would have to prove each of these elements beyond a reasonable doubt. The government would have to show:

-- That there was an intentional disclosure of information which did in fact identify a "covert agent;"

-- That the disclosure was made to an individual not authorized to receive classified information;

-- That the person who made the disclosure knew that the information disclosed did in fact identify a covert agent;

-- That the person who made the disclosure knew that the United States was taking affirmative measures to conceal the covert agent's classified intelligence affiliation;

-- That the individual making the disclosure did so in the course of a pattern of activities intended to identify and expose covert agents; and,

-- That the disclosure was made with reason to believe that such activities would impair or impede the foreign intelligence activities of the United States.

Because of these strict conditions, which narrowly define the prohibited conduct, I believe it is clear that subsection 601(c) is directed at conduct which the Congress has the authority and power to proscribe consistent with the First Amendment, and that this Bill does so in a constitutional fashion.

Mr. Chairman, I understand that the Department of Justice believes that the Senate version of the Bill better captures the concerted nature of the activity which is intended to be proscribed than does the House Bill, and that there are prosecutorial and evidentiary advantages to the Senate language. I believe that the Department's witness will speak to this matter.

Mr. Chairman, S. 391 will deal with a clear and immediate danger which currently--each and every day--endangers our intelligence activities, our staff officers, and the lives of those who are cooperating with our nation abroad. I want to express my gratitude and appreciation to the Subcommittee for so promptly bringing this legislation forward and reiterate the hope that it will be enacted into law as quickly as possible so that this intolerable situation is remedied.

I will be happy to answer any questions you may have.

PATRICK J. LEAHY
VERMONT

United States Senate
WASHINGTON, D.C. 20510

COMMITTEES
AGRICULTURE, NUTRITION, AND FORESTRY
APPROPRIATIONS
JUDICIARY
INTELLIGENCE
DEPUTY DEMOCRATIC WHIP

May 12, 1981

Mr. William Casey
Director of Central Intelligence
Central Intelligence Agency
Washington, D.C. 20505

Dear Mr. Casey:

I want to thank you again for your most helpful testimony on S. 391, the Intelligence Identity's Protection Act of 1981.

I would like to get your response, for the record, to three additional questions which time did not permit me to ask at the hearing on Friday. They are as follows:

1) You have testified that you have a preference for the "reason to believe" language of Section 601 (c) contained in S. 391, as opposed to the "with the intent to impair or impede" language of Section 601 (c) contained in H.R. 4. I understand that the Justice Department is of the view that this element of the crime would be easier to prove under the language of the Senate Bill than that contained in the House version. My question is, do you know of actual circumstances where the names of agents were disclosed with reason to believe that disclosure would impair or impede the foreign intelligence activities of the United States, but the person did so without any intent of neutralizing a covert agent or impairing or impeding our intelligence activities? (I understand that you may not be able to submit the answer to this question for the public record.)

2) By letter dated April 29, 1981, to the House Permanent Select Committee on Intelligence, you suggested a technical amendment to H.R. 4. You suggest including the offenses contained in H.R. 4, the offenses listed in the Privacy Protection Act of 1980, the Stanford Daily legislation, which would give rise to a newsroom search and seizure. You did not raise this amendment in your testimony before the Subcommittee on Security and Terrorism. 1) Is this because you have changed your position? 2) If you have not changed your position, why do you believe it is necessary to expand the list of exemptions to the subpoena-only standard set up in the Stanford Daily legislation? 3) Have you consulted with the Department of Justice about seeking this amendment to H.R. 4?

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3) In reporting the Privacy Protection Act of 1980, the Senate Judiciary Committee recognized a legal controversy concerning 18 U.S.C. 793, which covers the espionage offense of gathering, transmitting or losing defense information. The controversy concerned whetner that statute required proof of intent to injure the United States or give advantage to a foreign power. There is a conflict of judicial authority on this point. The Committee stated in its report on the bill:

> Obviously, the Committee does not attempt to settle this controversy in this bill. However, to the extent that S. 1790 provides a suspect exception related to the national security statutes which are stated, it is the intent of the Committee that with regard to 18 U.S.C. 793 the suspect exception to the ban on searches would apply only if there was an allegation of an intent to injure the United States or give advantage to a foreign power. For the purposes of this Act, the government shall recognize the higher standard, the requirement of intent, before utilizing the suspect exception for searches for materials sought under 18 U.S.C. 793.

S. Rep. 874, 96th Cong., 2d Sess. 12 (1980).

S. 391 presents a similar problem to the Committee if it is to consider a simultaneous amendment to the Privacy Protection Act of 1980. Assuming the Committee considers some amendment to the Stanford Daily legislation, would you support including only section 601 (a) and 601 (b) in the list of exempted statutes, that is, would you support elimination of section 601 (c) which presently does not contain an intent to injure standard?

I look forward to receiving your responses to these questions.

Sincerely,

PATRICK J. LEAHY
United States Senator

PJL:kmp

9 June 1981

Honorable Patrick J. Leahy
United States Senate
Washington, D.C. 20510

Dear Senator Leahy:

This is in response to your letter of 12 May in which you posed a number of questions concerning S. 391, the "Intelligence Identities Protection Act."

With regard to your first question, the Administration believes that from a prosecutorial perspective the Senate's subsection 601(c) "reason to believe" standard is preferable to the "intent to impair or impede" language of H.R. 4. The Department of Justice is in the best position to evaluate the practical evidentiary problems that can develop in a criminal prosecution. Although it might appear that past disclosures which would have met all of S. 391's other criteria and which also would have met the requisite "reason to believe" standard have been accompanied by something like an "intent of neutralizing a covert agent or impairing or impeding our intelligence activities," the Administration's concern is that it could be difficult to prove beyond a reasonable doubt the kind of subjective intent as to purpose now contained in H.R. 4. Such proof might be particularly troublesome if an unauthorized disclosure were to be accompanied by a declaration that its ultimate intent was to somehow enhance intelligence capabilities.

Your second and third questions deal with my suggestion that the House Intelligence Committee consider amending the "Privacy Protection Act of 1980" (P.L. 96-440) so as to include unauthorized disclosures of intelligence identities among the enumerated offenses for which court authorized searches and seizures may be conducted. As you know, this enumeration was not intended to give the listed statutes any special standing. It was designed to ensure that their enforcement was not obstructed by the Privacy Protection Act's prohibition of court authorized searches to enforce relatively minor receipt, possession, or communication offenses. The sole effect of this enumeration is to preserve with respect to the listed national security-related offenses an authority applicable to virtually all other offenses, i.e., use of a search warrant to obtain documentary evidence in the possession of a suspect.

Addition of the Intelligence Identities Protection Act to the offenses now listed in the Privacy Protection Act would not conflict with the Judiciary Committee's intent with respect to 18 U.S.C. 793. I do not view that intent as inconsistent with the Administration's position that the pattern of activities and knowledge elements of the Identities legislation, combined with the serious consequences of unauthorized disclosures, make it appropriate to include the offense among those for which a search warrant may be obtained pursuant to the Privacy Protection Act whether the Identities legislation is ultimately enacted with a "reason to believe" or an "intent to impair or impede" standard.

I would emphasize that this is not an issue which should be allowed to delay consideration of the Identities Bill, and I would support separate consideration of the extent to which the Identities statute ought to be added to the Privacy Protection Act. My letter to Chairman Boland of the House Intelligence Committee merely suggested that the Committee might wish to consider the issue, and I did not raise the matter in my Senate testimony because I do not consider it to be integral to the Identities Bill. I thank you for your continuing interest in this matter and look forward to working with you to ensure speedy enactment of the Identities legislation.

Sincerely,

William J. Casey

Senator DENTON. Our next witness is Richard K. Willard, Counsel for Intelligence Policy, Department of Justice.

Good morning, Mr. Willard, and welcome.

STATEMENT OF RICHARD K. WILLARD, ESQ., COUNSEL FOR INTELLIGENCE POLICY, U.S. DEPARTMENT OF JUSTICE

Mr. WILLARD. Thank you, Mr. Chairman.

It is a pleasure for me to appear before you on behalf of the Attorney General today to express the views of the Department of Justice regarding S. 391. With your permission, Mr. Chairman, I would like to make a few brief remarks at the outset, and submit my prepared statement for the record without reading it in its entirety at this time.

Senator DENTON. Surely; permission granted, sir.

Mr. WILLARD. I would like to emphasize at the outset that the Department of Justice strongly supports the enactment of this legislation to protect the identities of the clandestine intelligence officers, agents, and sources who serve this country.

Senator Chafee and Director Casey have spoken eloquently today of the need for this legislation, and we fully agree with their views in this regard. It has been the position of the Department that the knowing disclosure of the classified identity of a clandestine officer, agent, or source of an intelligence agency could constitute a violation of certain sections of the existing espionage laws. Nevertheless, we agree that additional and more specific legislation would

facilitate prosecution of those who seeks to make these disclosures, and thus neutralize the intelligence agents who serve our country.

I would like to turn specifically to S. 391 which is now under consideration after having been introduced in this Congress by Senator Chafee on behalf of himself and a number of other distinguished Senators.

This bill would prohibit the disclosure of information identifying a "covert agent." This is a defined term covering a range of Government employees, agents, informants and sources. Varying penalties would be applied to three different categories of persons who may be involved in the unauthorized disclosure of such information.

SECTIONS 601(A) AND (B)

The first two categories provided in this bill have not been controversial. These provisions add substantial protection against disclosure by current and former Government employees and contractors who have had authorized access to classified information and the identities of covert agents. The fact that these persons have had access to such classified information lends an aura of credibility to disclosures by them. In addition, this access may provide them with a degree of expertise regarding how covert identities are concealed and the means for piercing such concealment measures.

We have one suggestion with regard to these provisions, which are identified as sections 601(a) and 601(b) in S. 391. Neither section now includes a provision that would criminalize attempts to commit the proscribed actions. An "attempts" provision would specifically authorize the Government to initiate the prosecution of any person who meets the standards of these two sections, and who has taken a substantial step toward, but has not completed, the disclosure of the identities of covert agents.

Such conduct should be subject to punishment without forcing the Government to delay until the identities have actually been disclosed to the public and the harm already done. We believe the penalty for a violation of an "attempts" provision should be somewhat lower than for an actual disclosure.

SECTION 601(C)

The third and final category of persons covered by the bill is described in section 601(c). This section has attracted the most attention and includes persons who have not had authorized access to classified information that identifies or results in learning the identities of covert agents.

Section 601(c) would penalize a person who knowingly discloses the identity of a covert agent in the course of a:

> Pattern of activities intended to identify and expose covert agents and with reason to believe that such activities would impair or impede the foreign intelligence activities of the United States.

This provision would provide a criminal penalty for any person, including those who have never had authorized access to classified material, who discloses information identifying a covert agent with the requisite state of mind, even if the information is derived entirely from public sources.

It has been argued that the principles of the first amendment are done violence when the Government seeks to punish actions based on information that is made available to the public. We do not believe this argument has any merit. As Senator Chafee pointed out, the first amendment is not absolute. We are totally confident that a carefully drafted bill such as S. 391 is constitutional.

Congressional hearings over the past 2 years have well documented the serious harm to the national defense caused by the actions this statute is intended to prevent. When compared with the extremely limited burden on speech, we believe that this serious harm justifies the proposed legislation.

We also believe that the objective standard of "intent" in section 601(c) would pass constitutional muster under a first amendment or due process challenge. We believe that this standard is preferable to the specific "intent" standard contained in the current House version of this legislation, section 601(c) of H.R. 4.

PROTECTION OF COVERT FBI AGENTS

In the discussion of H.R. 4, various Congressmen raised the question of whether it is appropriate to include penalties for the disclosure of the identities of covert FBI agents, sources and informants from this legislation. Two arguments have been made for excluding FBI covert agents.

One is that FBI personnel operate domestically rather than abroad, and hence are better protected from the risk of physical harm. The second argument is that there is no empirical record of exposures of FBI covert intelligence agents. We disagree, however, with both of these contentions.

It is inaccurate to state that FBI covert agents are insulated from a risk of physical harm, or that they operate exclusively in the United States. We note, for example, that people have attempted to use the Freedom of Information Act to determine the identities of FBI informants in a law-enforcement context.

In addition, there are many instances where FBI undercover agents must travel abroad in the course of a counterintelligence or counterterrorism investigation.

Moreover, FBI agents operating domestically may be operating undercover in a violence-prone terrorist group. In this situation, their safety cannot be assured if their FBI affiliation is revealed.

More significantly, however, the argument against including FBI agents in this legislation appears to underestimate the harmful effects such a disclosure would have on the Government's ability to maintain effective counterintelligence and counterterrorism operations. These operations are critical to our ability to monitor and prevent damaging penetrations by hostile intelligence services. If compromised by public disclosure of our covert agents' identities, serious damage to our national security could result.

Mr. Chairman, it is our belief that this bill will strike the proper balance among the various competing interests we must consider. Legislation of this nature is critical to the morale and confidence of our intelligence officers and their sources. The Justice Department strongly recommends that it be reported out of this subcommittee with a favorable recommendation for enactment by this Congress.

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I would be happy to address any questions you may have at this time.

PROSECUTIONS UNDER S. 391

Senator DENTON. Thank you very much, Mr. Willard.

Does the DOJ feel that the unauthorized disclosures that S. 391 addresses can be effectively prosecuted under its provisions?

Mr. WILLARD. Yes, sir, Mr. Chairman, we do. These provisions have been developed in consultation with the lawyers who prosecute crimes of this nature, and they believe that this statute is both constitutional and enforceable.

Senator DENTON. Do you foresee any problems with the various burdens of proof which it must meet in prosecuting violations under S. 391?

Mr. WILLARD. Well, Mr. Chairman, we have to say that section 601(c) imposes a very heavy burden on the Government. There are six separate elements to this offense, and it will not be easy to prove a violation. However, we believe that prosecution will be possible for the serious disclosures that concerns this committee.

Senator DENTON. What would you see as the impact on addressing the problem of unauthorized disclosures if section 601(c) were removed from the bill?

Mr. WILLARD. We think this would seriously limit effectiveness of the bill. The unauthorized disclosures that have concerned this committee and other committees in the Congress have frequently been made by people who cannot be shown to have had direct access to classified information. Therefore, we believe it is essential to have a provision like section 601(c) to eliminate the harm that concerns the committee.

APPLICATION OF EXISTING LAW

Senator DENTON. The Department of Justice has stated in the past that it feels wrongful disclosure of classified information concerning an agent's identity constitutes a violation of the existing espionage statutes, 18 U.S.C. 793 (d) and (e), and 18 U.S.C. 794.

How many prosecutions have there been under these statutes for offenses addressed by S. 391? That is, the revealing of identities of intelligence officers and sources?

Mr. WILLARD. To my knowledge, Mr. Chairman, there have been none.

Senator DENTON. Do the present espionage statutes cover activity proscribed by section 601(c) of S. 391 such as publication or republication?

Mr. WILLARD. Section 601(c) is a different, more specific statute. We think it will be more useful in prosecuting these types of activities than the existing espionage law.

Senator DENTON. I would like to take time to recognize the presence of my distinguished colleague from North Carolina who is the chairman of the Subcommittee on Separation of Powers on this committee. I serve with him on that subcommittee, and unfortunately we are often having hearings at the same time.

For the record, I would like to submit my feeling of great admiration for him as a Senator, and for his conscientious efforts in his current hearings.

Welcome, Senator East.

Senator EAST. Thank you, sir.

REVELATION OF FBI AGENTS

Senator DENTON. To date, FBI secret identities of agents who travel abroad have not been revealed. Would it have an adverse effect if identities were revealed, as has happened to CIA agents?

Mr. WILLARD. Yes, Mr. Chairman. We do not think that the FBI's good record of protecting its agents should be held against it and used to deny FBI agents the kind of protection that would be very helpful to them in the future.

Senator DENTON. Have the problems encountered by the CIA impacted on the FBI's ability to conduct foreign intelligence, foreign counterintelligence, and foreign counterterrorism activities? And if so, how?

Mr. WILLARD. Mr. Chairman, I think that the climate created by the activities that this committee has addressed has an effect on the activities of all the intelligence services in a general way. I am not prepared at this point in open session to discuss specific ways they have impacted on FBI counterintelligence or counterterrorism operations, but I think that the Bureau would be happy to provide that information in classified form to this committee.

Senator DENTON. We would look forward to receiving that, sir.

I would like to welcome Senator Biden who has survived some train difficulties. He informs us that, regrettably, one person was killed in the train ahead of his.

Welcome, Senator Biden, and again I want to acknowledge your tremendous experience in this field, and your most effective efforts in the past.

Senator BIDEN. Thank you, Mr. Chairman.

Mr. Chairman, for the record, there was no one in the train that I was riding who was killed, but a northbound Metroliner going through the Baltimore tunnel struck a flagman who was supposed to be the one warning of the train coming that killed him, blocking the tunnel for 1 hour. So I apologize to the witnesses who have already gone, and to those of you who are here, for being late. It does not evidence a lack of interest in this topic on my part.

Thank you, Mr. Chairman.

Senator DENTON. Thank you, Senator Biden.

I would pause here and ask Senator East, first, if he cares to make any statement due to perhaps the transiency of appearance here, because of overriding requirements somewhere else?

Senator EAST. Senator, I thank you for the opportunity. I am pleased to be here. I am sorry that because of other conflicts I have not been able to be with you from the beginning, but as a great admirer of your service in Vietnam and of the great contribution you are now making as a U.S. Senator, it is a pleasure to be associated with you on this subcommittee.

I am a cosponsor of this bill, so my sentiments and commitments are well known there, and I will not then delay the hearings with any further comment, except to say publicly, which I would like to say, my great admiration for you as a person and as one of America's truly national heroes and the great honor I consider it as a